

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE A. TRINIDAD QUILES

Plaintiff

v.

COMMISSIONER OF SOCIAL SECURITY

Defendants

CIVIL NO. 09-2178 (JAG)

OPINION AND ORDER

On November 11, 2009, José A. Trinidad Quiles ("Plaintiff") appearing *pro se* sought review, pursuant to section 205(g) of the Social Security Act (the "Act"), 42 U.S.C. § 405(g), of a final determination rendered by the Commissioner denying his request of disability insurance benefits (Docket No. 2). The Commissioner filed a Motion Requesting an Order Affirming the Final Decision (Docket No. 22). Plaintiff, on the other hand, failed to file a memorandum in support of his petition notwithstanding the fact that the Court granted him several extensions of time to do so. (Docket Nos. 8; 18; 24; 26).

On September 27, 2010, the case was referred to a Magistrate Judge for a Report and Recommendation. (Docket No. 28). On December 1, 2010, the Magistrate Judge issued a Report and Recommendation advising the Court to affirm the Commissioner's decision. (Docket No. 30).

Within the prescribed period to file objection, Plaintiff requested an extension of time in order to find legal representation. (Docket No. 31). The Court granted the extension and advised him to request the appointment of a *pro bono* counsel. (Docket No. 32). Plaintiff completed the necessary documentation and the Clerk appointed an attorney. (Docket No. 35).

Plaintiff, through the newly appointed counsel, filed Objections to the Report and Recommendation. (Docket No. 39). He argues, in essence, that the Magistrate Judge erred in finding that the evidence revealed that there was no objective evidence of physical deficits that would prevent him from performing any gainful activity and in finding that his testimony was not entirely credible. The Commissioner filed a brief response requesting that the Court affirm his decision. (Docket No. 40).

After a careful review of the transcript of the proceedings before the Bureau of Hearings and Appeals (Docket No. 12) and the parties' arguments before this Court, we conclude that the Commissioner's findings are supported by substantial evidence.

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b) and Local Rule 72, a district court may refer dispositive motions to a United States magistrate judge for a report and recommendation. See Alamo Rodriguez v. Pfizer Pharmaceuticals,

Inc., 286 F. Supp. 2d 144, 146 (D.P.R. 2003). The adversely affected party may "contest the [m]agistrate [j]udge's report and recommendation by filing objections 'within ten days of being served' with a copy of the order." United States v. Mercado Pagan, 286 F. Supp. 2d 231, 233 (D.P.R. 2003) (citing 28 U.S.C. § 636(b)(1)). If objections are timely filed, the district judge shall "make a *de novo* determination of those portions of the report or specified findings or recommendation to which [an] objection is made." Rivera-De-Leon v. Maxon Eng'g Servs., 283 F. Supp. 2d 550, 555 (D.P.R. 2003). It is well settled that a district court can "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Alamo Rodriguez, 286 F. Supp. 2d at 146 (citing Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985)). However, if the affected party fails to timely file objections, the district court can assume that they have agreed to the magistrate judge's recommendation. Id.

ANALYSIS

To establish entitlement to benefits, Plaintiff bears the burden of proving that he became disabled within the meaning of the Act. See, e.g., Deblois v. Secretary of HHS, 686 F.2d 76, 79 (1st Cir. 1982). Plaintiff may be considered disabled within the meaning of the Act only if he is unable to perform any substantial gainful work because of a medical condition that can

be expected to last for a continuous period of at least 12 months. See 42 U.S.C. §§ 416(i)(1), 423(d)(1). Plaintiff's impairment must be so severe as to prevent him from working, not only in his usual occupation, but in any other substantial gainful work considering his age, education, training, and work experience. See 42 U.S.C. § 423(d)(2)(A). Evidence of a physical impairment cannot suffice for an award of disability insurance benefits; Plaintiff must also be precluded from engaging in any substantial gainful activity by reason of such impairment. See, e.g., McDonald v. Secretary of HHS, 795 F.2d 1118, 1120 (1st Cir. 1986). Moreover, Plaintiff's complaints cannot provide the basis of entitlement when they are not supported by medical evidence. Avery v. Secretary of HHS, 797 F.2d 19, 20-21 (1st Cir. 1986).

The findings of fact made by the Administrative Law Judge ("ALJ") "are conclusive when supported by substantial evidence, 42 U.S.C. § 405(g), but are not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts." Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999). The resolution of conflicts in the evidence and the ultimate determination of disability are for the ALJ, not the courts. See Rodriguez v. Secretary of HHS, 647 F.2d 218, 222 (1st Cir. 1981).

After a careful *de novo* review of the record, the Court finds that the Magistrate Judge did not err in concluding that that substantial evidence supports the Commissioner's decision. That is, that Plaintiff is not disabled and that he has not met his burden of proving otherwise. A review of the transcript shows that there is substantial evidence, i.e. reports from the consultative psychiatrist and neurologist, to support a finding regarding that fact that Plaintiff's mental condition is not disabling. The ALJ's finding of fact in this regard is supported by substantial evidence and is, therefore, conclusive. It was the ALJ's prerogative to solve the conflict between the report filed by the consultative physicians and the report prepared by Plaintiff's psychiatrist and Plaintiff's own testimony. It was also the ALJ's prerogative to gage Plaintiff's credibility during his testimony.

The ALJ also had substantial evidence before him to support a finding that Plaintiff is not physically disabled due to his back pain. Spinal Xrays reveal narrow disc spaces and severe narrowing at certain levels, loss of the vertebral body height and presence of osteophytes or bone spurs. However, the Xrays also reveal that the vertebral bodies are intact, normally aligned and that no acute pathology is present. The record also shows that Plaintiff has not received any medical treatment for his back since 2002, when he was treated for a herniated disc.

The Court finds that the ALJ was correct in concluding that the Xrays do not reveal a physical disability that would prevent Plaintiff from engaging in gainful work. Even when his symptoms are considered severe and he might be experiencing constant pain,, the evidence simply does not support a finding of complete disability.

CONSLUSION

For the reasons set forth above, the Court hereby **ADOPTS** the Magistrate Judge's Report and Recommendation in its entirety and, accordingly, **GRANTS** the Commissioner's Motion Requesting an Order Affirming the Final Decision. (Docket No. 22). Judgment dismissing the case shall be entered.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 12th day of April, 2011.

S/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge